Los Angeles Soap Company ***and*** **International Chemical Workers Union, Local 1.** Case 21–CA–25893

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On September 27, 1989, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Charging Party filed a supplemental brief in response to the Respondent's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt his recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Los Angeles Soap Company, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We agree with the judge that the Respondent violated Sec. 8(a)(5) by failing to provide the Union with timely notice of its decision to cease operations and by failing to bargain with the Union over the effects of that decision. Absent special or emergency circumstances, which the judge properly found did not exist here, the Board has held that ''pre-implementation notice is required to satisfy the obligation to bargain over [the] effects'' of a decision to close. *Metropolitan Teletronics*, 279 NLRB 957, 959 fn. 14 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987). See also *Willamette Tug & Barge Co.*, 300 NLRB No. 32, issued this day. Because the judge correctly found that the Respondent violated the Act by failing to provide the Union with any advance notice of the cessation of operations, we find it unnecessary to address the question of when the Respondent's duty to notify the Union first arose.

Margaret D. Hume, Esq., for the General Counsel.
Andrew Peterson and *Lisa S. Mundel, Esqs.*, of Los Angeles, California, for the Respondent.
Robert M. Young, Esq., of Akron, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was submitted to me for decision on May 24, 1989,[1] after the parties waived hearing and executed a stipulation of trial record with attached exhibits, pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 21 on June 30, 1988, and which is based on charges filed by International Chemical Workers Union Local 1 (the Union or Charging Party), on December 6 and December 28, 1987 (first amended charge), and January 13, 1988 (second amended charge). The complaint alleges that Los Angeles Soap Company (Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the Act.

[1] All dates herein refer to 1987 unless otherwise indicated.

Issues

Whether Respondent closed its business without prior timely notice to the Union of its decision to close, and without having afforded the Union an opportunity to bargain in good faith as the exclusive representative of Respondent's employees, about the effects on employees of its decision to close its business. All parties were given full opportunity to participate, to introduce relevant evidence, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel, Charging Party and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a Delaware corporation engaged in the manufacture of soap, detergent, and water conditioning products and having a facility located in Los Angeles, California. It further admits that during the past year, in the course and conduct of its business, it has sold and shipped goods and products valued in excess of $50,000 directly to customers located outside the State of California. Accordingly it admits, and I find, that it is an employer engaged in commerce and is a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Chemical Workers Union, Local 1 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Until May 8, Respondent manufactured soap, detergent, and water conditioning products. Beginning May 8, Respondent manufactured soap and water conditioning products until February 1988. On or about December 4, Respondent closed its operations under the circumstances detailed below. Between December 4, and mid-February 1988, Respondent maintained limited manufacturing in order to fulfill certain business commitments and to wind-down operations.

When operating, Respondent had 26 buildings on its property of almost 8 acres, and 15 of these buildings were used in its operations (Exh. 7). Employed in and around these buildings were persons represented by several different unions.

First, for at least 20 years prior to Respondent's cessation of business, Charging Party Union represented a unit of factory workers employed in the following departments: (a) soap making, 13 employes; (b) toilet soap, 47 employees; (c) package machine maintenance, 2 employees; (d) powder, 1 employee; and (e) janitor, 3 employees.

Second, Teamsters Local No. 630 represented three employees in the warehouse and three employees in the shipping departments. Third, the Pipefitters, Machinists, and Electrical Unions represented nine employees in maintenance. Fourth, the Operating Engineers represented two employees in the boiler department.

The Respondent recognized the Union as the 9(a) representative of the employees described above. Such recognition was embodied in successive collective-bargaining agreements, the most recent of which was negotiated in August and September, effective between September 1 to August 31, 1990 (Exh. 6).

2. Preclosure events

As noted above, in May Respondent discontinued manufacturing dry detergent and sold the machinery used in the process to Huish Chemical Company, which then manufactured the detergent for sale by Respondent. On or about April 1, Respondent notified the Union which represented 46 employees in the affected department. As a result of the discontinuance, 39 employees were permanently laid off. Senior employees in the affected department were permitted to transfer to other departments and bump junior employees, plantwide into layoffs.

Notwithstanding the apparent timely notice to the Union regarding the partial shutdown, the Union made no demands on Respondent with respect to severance pay or out-placement service. However, Respondent and the Union did have certain discussions, primarily about the application of seniority and the training of employees who were to remain after the layoff. In addition, they discussed payment to employees of amounts earned under the contract for sick leave and vacation pay.

In addition to the discussions noted above, the parties discussed future concerns. For example, Kent Wilson, the Union's business agent, asked David Luckett, Respondent's director of administration,[2] such questions as ''What's going to happen with the Company? Do you think it will shut down?'' To these questions, Luckett consistently responded that, ''to the best of my knowledge, no. I wouldn't be here if the intention was to shut it down. They would not have brought in new management including a new president, if they were intending to close.''

During the time that Respondent discontinued its dry detergent operations, two events occurred which influenced the approach of Respondent and Valley Products Co., a Tennessee soap manufacturing company, and eventual purchaser of Respondent's business, to the December 4 sale and subsequent events. The first event concerned rumors developing among Respondent's brokers, customers, suppliers, and competitors, to the effect that Respondent was closing its entire operation. Respondent's president, Vernon Bacher, learned of these rumors from inquiries made to him or to other Respondent employees who reported to him, seeking to verify the rumors. As a result of the rumors, Respondent's suppliers expressed reluctance to continue permitting Respondent to purchase packaging and raw materials on credit. Virtually on a daily basis, Respondent's director of operations, Robert Stickman, was required to assure those with whom it was doing business, that Respondent intended to continue in business.

The second event in question concerned certain damage done to the goods sold to Huish, apparently by sabotage committed by one or more of Respondent's employees, without the Union's authorization or condonation. No evidence shows the Union was even aware of the alleged sabotage. In any event, as a result of the damage, Respondent was required to reduce the purchase price of the equipment by $75,000, one-half of the agreed on purchase price.

3. The summer of 1987 negotiations for new labor agreements

Respondent maintained separate collective-bargaining agreements with the six unions mentioned above. Because all agreements expired on August 31, all of the unions and Respondent, in accord with the usual and customary practice, conducted joint negotiations in an effort to reach separate renewal agreements with each union effective September 1. At the time of the joint negotiating sessions which began in August, there was no intention on the part of Respondent's ownership or management to sell its assets or to close the plant.

Beginning in July, before negotiations formally began, Luckett and Wilson met to discuss their respective goals in the negotiations. At this time, Wilson again raised questions with Luckett regarding Respondent's future: For example, Wilson asked, ''What is going to happen with the Company? Do you think it will shut down?'' Luckett's responses appeared less certain than in the past. While reiterating that he did not anticipate that the plant would shut down and that it was management's goal to continue operations, Luckett added that Respondent was in bad fiscal shape and that discontinuance of its operations was a possibility.

Again rumors circulated that Respondent would close so that its owners could sell the land, which was thought to be valuable. In an attempt to confirm or rebut these rumors, Wilson again inquired of Luckett who said closure was always a possibility, but he believed Respondent could be turned around.

At the first bargaining session, Luckett explained in detail to the unions Respondent's financial problems occurring over the previous 2-1/2 years. More specifically, Luckett explained that Respondent owed money to almost everybody and was having difficulty paying its bills. He added that Respondent could not sustain the losses without shutting down the plant, but Luckett expressed hope that Respondent would be able to turn the situation around.

To attempt to alleviate Respondent's operating problems, Luckett presented extensive proposals, which surprised the unions. At no time did Respondent suggest that concessions would significantly influence its fiscal condition.

During the negotiations, Charging Party and one or two other unions proposed severance pay in the event of a plant closure. The proposal included 2 years' advance notification of full or partial plant closure or of layoffs, affecting 10 percent or more of the work force, and implied that there would be a schedule of severance pay (Exh. 8). Luckett objected to the proposal, because he claimed it would send a signal to competitors, suppliers, and lenders that Respondent was in severe trouble. As a second basis for his objection, Luckett

[2] Luckett is and was sole proprietor of Contemporary Consultants, Fresno, California. Although acting as Respondent's director of administration, he was not an employee of Respondent.

stated that because there was only so much money available to settle the unions' contracts, they should ''tell me where you want it.'' Finally, Luckett explained that the unions would have to agree to some concessions to make any money available.

During August and September, the parties continued their negotiations, with each side rejecting many proposals advanced by the other side. Ultimately, the unions agreed to certain concessions which did not cost the employees any money out of pocket, that is, their take-home pay remained the same. The unions also agreed to a freeze on wages and other benefits and to the elimination of Veterans Day as a holiday. For its part, Respondent agreed to increase its pension contributions for Charging Party by 15 cents per hour.

4. The October 28 resolution

On October 28, Respondent's board of directors met to consider the fiscal condition of Respondent and to discuss alternatives by which Respondent could resolve its financial crisis. Ultimately, the Board adapted a resolution to shut down Respondent's operations, either by liquidating and dissolving the Company or by converting the real estate to rental property (Exh. 9).

In reaching its decision, the board of directors relied on 2-1/2 years of losses which had used up Respondent's credit and resources. More specifically, these financial losses amounted to $250,000 in fiscal (calendar) year 1985; $2,600,000 in fiscal (calendar) year 1986; and $1,670,000 in the first two quarters of 1987. These figures had been shared with the unions during the negotiations of August and September.

The board of directors also noted and relied on certain other liabilities: (1) the Southern California Air Quality Management District was suing Respondent in court in two separate cases to collect fines of $75,000 each (based on May citations); (2) the city of Los Angeles Building Department was demanding that Respondent's extensive holdings be brought up to code. The demand resulted in Respondent spending $148,000 on June 2 for partial repair of building 2 and in receiving an estimate of $115,000 to repair building 3, and in foregoing estimates on several other of its buildings because Respondent did not have the money to do the work. (In October 1986, an estimate of $1,176,000 had been made as the cost for Respondent to bring all its buildings up to code.) Subsequent to an October 1 earthquake, the city began formal proceedings to require Respondent to bring its buildings up to code or to cease operations. To bring Respondent's buildings up to code required not only structural improvements, but also asbestos removal in at least five buildings which could not be brought up to code and thus were slated for demolition. The estimated cost of predemolition asbestos removal ranged up to $400,000. The city would not issue the necessary permits for demolition until the asbestos had been removed.

The final factor on which the board of directors relied was Respondent's inability to secure adequate financing. The unsuccessful effort to secure financing had begun in February and continued for the next 7 months. Even offering Respondent's extensive real estate as collateral did not help, because lenders said there was no guaranteed way for Respondent to service the debt and the land could not provide the liquidity necessary to pay off any debt without fatally damaging Respondent's ability to operate.[3]

In light of the above facts as confirmed by dismal cash flow projections, and the lack of any viable alternatives, Respondent's board of directors adopted the resolution described above.

5. The search for a buyer

Respondent's search for a buyer was conducted in confidence so as not to alarm its customers who would then seek out other manufacturers to supply their needs. Notwithstanding its financial problems, Respondent did have a significant market share of the hotel/travel industry trade, which might be subject to erosion if Respondent's customers learned of its plans to sell the business.

Not only were Respondent's customers to remain uninformed, but Respondent's suppliers as well. In many or most cases, Respondent had reached the end of its credit lines and was therefore paying just enough to keep its vendors supplying its needs. All suppliers were threatening to cut off Respondent from further supplies. The situation with Respondent's supplies of cartons was typical. Respondent was in arrears approximately $800,000 to this supplier. Without cartons, Respondent could not pack and ship its products. Respondent concluded that if its suppliers learned of Respondent's interest in selling, the suppliers would have demanded all back payments as well as payment in advance for new supplies. This would have put Respondent out of business immediately.

On or about November 1, Bacher made contact with Valley and commenced arm's-length negotiations for the sale of Respondent. On or about November 10, James Brazeale, president of Valley, requested a confidential visit to Respondent's premises which occurred on November 14.

After Brazeale visited the premises and reviewed certain information including descriptions of equipment and inventory, Valley continued negotiations under strict secrecy. Valley shared Respondent's view that the value of Respondent's business was in large measure contingent on continuing Respondent's market share and that premature disclosure of the negotiations might well reduce or even eliminate Respondent's market share. Accordingly, for Respondent, up to November 10, only Bacher and Andrew Forthmann Sr., chairman of Respondent's board and, after November 10, Stickman were privy to the negotiations. For Valley, only Brazeale and his executive vice president, Wallace Bruce were privy to the negotiations.

6. Valley's purchase of Respondent's business

On November 17, Valley submitted to Bacher, by ''Fax,'' a handwritten offer to purchase the six lines that formed the soap bars and wrapped them (Exh. 10). Then by telephone, Brazeale told Bacher that he also desired to make an offer for the soap manufacturing plant. After additional negotiations, the parties apparently agreed on a ''round figure.'' The parties also agreed that as of November 17, Luckett would be told of the sale, but no one else. Luckett was informed

[3] One factor on which the board of directors did not rely was labor rates. Respondent's accounting figures presented to the Board showed that even a 50-percent reduction in labor rates would not make a material difference in Respondent's ability to continue operations.

because he would be responsible for deciding what was to be done with respect to Respondent's employees and for providing adequate security to protect personnel and property. At this time Bacher indicated that the final decision on the sale would not occur until Friday, December 4. Both sides agreed that if word of the transaction leaked out, Respondent would either shut down on the spot and attempt to consummate the sale as soon as possible, or forget about the pending sale to Valley. Brazeale again expressed concern, apparently to Bacher, about sabotage such as had occurred when the dry detergent equipment was sold to Huish and loss of market share if word leaked out.

On November 19, Bacher and Brazeale agreed on a firm price and the former agreed to Brazeale's added condition that for business reasons, the sale should occur on a Friday.

A side negotiation between Bacher and Huish for the sale of certain of Respondent's retail labels was closed on November 20 (Exh. 11).[4] Thereafter, Bacher and his wife working alone so as not to compromise the need for confidentiality, prepared the necessary documents for the sale to Valley. The subject of confidentiality was repeatedly discussed during a series of telephone calls between Bacher and Bruce between November 23 and December 4.

Meanwhile on December 1, Bacher gave Luckett a list of activities for which Luckett was responsible prior to December 4. Luckett was also told to prepare a plan for security and for the layoff of administrative and union personnel. Bacher added that nothing was to be done until the sales documents had been signed. Bacher also gave Luckett an assignment schedule for December 3, 4, and 5 (Exh. 12). This included notification of certain key persons in the plant who would be responsible for security, and key administrative officials who also were given certain assignments. In addition, Forthmann Sr. was to inform the nonemployee members of his family of Respondent's intention to sell. The Forthmann family was Respondent's major stockholder and included a salesman for Respondent, Andrew Forthmann Jr.

On December 4, the board of directors convened by conference telephone call and approved the sale. The execution of relevant documents was set for 1:30 that afternoon, but a 45-minute delay was caused by the inadvertent absence from his office of Valley's senior counsel who needed to approve by telephone certain minor changes in the sale documents. Ultimately, all relevant documents were signed and the sale occurred (Exh. 14).

About 3:15 p.m., Luckett met with day-shift employees and informed them that the Company was closing permanently and would cease operations that afternoon. Speaking from a handwritten prepared text (Exh. 15), Luckett also conveyed information regarding final pay checks, locker cleanouts and departure from the premises ''ASAP.''

On December 4, Respondent sent notice of sale letters to its stockholders (Exh. 17) and Valley mailed notice letters to Respondent's former customers telling them that it was ''business as usual'' with Valley now supplying their business needs (Exh. 18).

[4] Huish was not notified of Respondent's sale until the afternoon of December 4. When told, Huish officials expressed surprise, stating they had not heard about the possibility that Respondent would close.

The proceeds of the valley sale were received by Respondent as follows:

Date	*Amount*
12/6	$ 96,750
12/11	15,500
12/16	217,000
2/5/88	45,750
Total	[5]$350,000

7. Postsale events

As noted above, Charging Party represented a unit of 66 employees. Of these all but 13 were laid off. These 13 were retained to perform temporary miscellaneous duties for both valley and for Huish. Of these 13, 6 were laid off on January 29, 1988, and 6 others were laid off on February 15, 1988. The last was the janitor who stayed until June 17, 1988. Subsequently, two unit employees were recalled twice to perform cleanup work, but not production work.

With respect to the teamsters, all originally were retained. On January 29, 1988, two were laid off, but the other four were retained until February 15, 1988, performing packing and shipping duties.

With respect to the operating engineers, one was retained until January 29, 1988, to operate the bailer.

With respect to the machinists, one was retained, but resigned on February 5, 1988.

With respect to the electricians, one was retained until February 5, 1988.

Finally, both of the pipefitters were retained, one until June 10, 1988, and the other until December 4, 1988.

As part of his responsibilities on December 4, Luckett was instructed to notify the six union business agents about 3 p.m. Due to the delays described above, he placed his first business agent call to Wilson, about 4:25 p.m. However, Luckett was then unable to reach Wilson or any of the others.

About 7:15 p.m., on December 4, Wilson returned Luckett's call to the hotel where Luckett was staying. After telling Wilson of the sale, and explaining when the sale had actually occurred and why Wilson had not been notified earlier, Luckett added there was nothing to negotiate with respect to the decision to close the plant. Wilson remarked it was too bad the Union did not know about the sale sooner, and asked ''is there anything the Union can do to prevent closing it?'' To this Luckett responded, ''Yea, if you got 10 million bucks or there abouts.''

Wilson then stated, ''We need to talk about this.'' Luckett answered that he was ready to meet about the closure when Wilson was available, but Luckett added, ''the plant is closed, there is nothing we can do to change it.'' Wilson also made a specific inquiry about employee health insurance. The two men ended their conversation by agreeing to meet on Monday, December 7.

On December 7, Luckett and Wilson spoke by telephone. The latter said he wanted to come out and talk to Luckett ''about closing the plant down and relocating and making soap elsewhere.'' Luckett said, ''There is nothing to talk

[5] Respondent's December 31 balance sheet (Exh. 13) shows that as of December 4 Respondent's obligations exceeded the value of the business operation.

about, we haven't relocated.'' In response to Wilson's question regarding whether Respondent was subcontracting, Luckett denied Respondent had done this. Then Wilson added, ''We will have to talk about the effect on employees, benefits insurance, dental and severance.'' Luckett requested Wilson to put his concerns in writing and promised to meet Wilson later to discuss them.

Before the conversation ended, Wilson noted with regret the lack of a severance clause in the collective-bargaining agreement. To this Luckett replied that while Wilson had raised the subject and it had been discussed, there was no agreement reached to include a severance clause. Then Wilson again asked about employees' health insurance and about new jobs for laid-off employees.

Prior to their next meeting, both Wilson and Luckett made calls attempting to secure employment opportunities for laid-off employees. In addition, both contacted the union trust funds regarding health insurance and other benefits.

On December 11, union counsel wrote a letter to Luckett which reads as follows (Exh. 22):

> CERTIFIED—RETURN RECEIPT REQUESTED
>
> December 11, 1987
>
> Mr. David L. Luckett
> Director of Administration
> Los Angeles Soap Company
> Terminal Annex P.O. 2198
>
> Los Angeles, CA 90051
>
> Dear Sir:
>
> In regard to the unannounced movement of your plant and equipment from the Los Angeles area, International Chemical Workers Union, Local No. 1, c/o Leonard Perryman, Vice President, International Chemical Workers Union, 140 E. Commonwealth, Suite 207, Fullerton, California 92632 (Phone 441-0405 a/c 714), demands bargaining on the economics of this plant move as well as on the effects of this Company action on the bargaining unit members.
>
> The Union demands the right to see and study, and copy, bona fide Company financial statements and supporting schedules, prepared by a CPA, which will indicate Company's economic position for the past three (3) years.
>
> Please respond to International Vice President Leonard Perryman at the above address and phone number.
>
> The Union respectfully requests a quick response.
>
> Your very truly,
> /s/ Robert M. Young
> Assistant Counsel
>
> RMY:OS
> CC: Leonard Perryman
> Kent Wilson

This letter, the first written demand for bargaining by the Union, was received by Luckett on December 14.

On December 16, Luckett prepared a response to the Union's letter recited above. The response reads as follows (Exh. 23):

> December 16, 1987
>
> CERTIFIED—RETURN RECEIPT REQUIRED
>
> Robert M. Young, Esq.
> Assistant Counsel
> International Chemical Workers Union
> 1655 W. Market Street
> Akron, OH 44313
>
> Dear Mr. Young:
>
> This letter is written in reply to your letter dated December 11, 1987, addressed to the undersigned.
>
> It is obvious from your letter that you are operating under a misconception; i.e. the Los Angeles Soap Company is not, repeat not, moving its plant and/or equipment.
>
> The Los Angeles Soap Company closed permanently on December 4, 1987. All equipment and real estate are being sold as soon as possible. At the present time, 13 ICWU members are engaged in closeout operations.
>
> It is contemplated that a meeting will take place between Company representatives and Mr. Perryman on December 16, 1987 to discuss the effects of the company's closing on ICWU members.
>
> In regard to the second paragraph of your letter, our Counsel has advised that he is unaware of any law which requires the Company to provide the ICWU with copies of our financial statements. However, you should be aware that Company certified financial statements for years '86, '85, and '84 have been published and disseminated to stockholders.
>
> If you require clarification or amplication ¢sic on the legal aspects of the plant closure, please contact our legal counsel, Mr. Andrew C. Peterson of Paul, Hastings, Janofsky and Walker, 555 So. Flower Street, Los Angeles, CA 90071.
>
> Yours very truly,
> /s/ David L. Luckett
> Director of Administration
>
> DLL: lod
> CC: l. Perryman H/D
> A.C. Peterson

Also on December 16, Luckett and Stickman met with Wilson, Union Vice President Leonard Perryman and Vella, chief steward for the Union.[6] During the meeting, the Union raised the subject of severance pay for chemical workers who were laid off. Respondent indicated its willingness to negotiate with the Union about severance and told the Union to present its proposal in writing, as had been requested by Luckett in an earlier telephone conversation with Wilson. Again Respondent alluded to the subject of severance pay having been brought up during the August negotiations.

Another subject at the meeting concerned the failure of Respondent to give advance notification to the Union. To this Respondent stated that it did not know that the sale would be consummated until December 4. Finally, the parties discussed pending grievances which were not resolved, assistance to laid-off employees in finding other work, and ob-

[6] The record does not specifically state whether Luckett's letter of December 16 was received by anyone on the union side. However, such receipt can be reasonably inferred. I find that union officials received a copy during the meeting of December 16.

taining certain benefits from union trust funds. The parties agreed to meet again at a later date.

On January 19, 1988, Luckett and Stickman again met with Wilson and Vella to discuss various subjects: the unfair labor practice charges, pending grievances, and obtaining of various benefits by laid-off employees.

On February 4, 1988, the Machinists Union presented Luckett with a written proposal for severance. After a series of negotiations, the proposal was dropped. On February 24, the Machinists presented a revised written severance proposal. Again agreement was not reached and, although the Machinists' representative stated he would prepare a second revised proposal and set up another meeting, he has not done so as of May 24, 1989.

On February 5, 1988, the Union sent to Luckett a second letter which reads as follows (Exh. 24):

> February 5, 1988
> CERTIFIED-RETURN
> RECEIPT REQUESTED
>
> Mr. David L. Luckett
> Director of Administration
> Los Angeles Soap Company
> Terminal Annex P.O. 2198
> Los Angeles, CA 90051
>
> Dear Sir:
>
> In regard to your unannounced plant shut down on December 4, 1987, and lay-off of bargaining unit employees, followed immediately by removal and shipment of much of the plant production equipment to Tennessee, the Union hereby demands that the Employer, Los Angeles Soap Company meet with the Union and discuss bargainable topics related to the effect of such Company action, such topics including but not limited to the following:
>
> 1. Severance Benefits
> 2. Job Search Assistance
> 3. Distribution of Accrued Pension Benefits
> 4. Pending Grievances
> 5. Accrued Vacation Credits
> 6. Medical Benefits and Other Pending Insurance Claims
> 7. Right to Accrued Benefits, if any, Under Profit Sharing Plans, Stock Options, etc.
>
> It is anticipated by the Union that bargaining over the above-listed topics and sundry related topics will require numerous bargaining sessions over some period of time.
>
> The Union has recently discovered that the Company has made unilateral approaches to individual bargaining unit members on some of the above bargaining topics before ever meeting with representatives of ICWU.
>
> The Union respectfully requests a quick response.
>
> Yours very truly,
> /s/ Robert M. Young
> Assistant Counsel
>
> RMY:mjn
> cc: Leonard Perryman
> Kent Wilson

Luckett replied as follows (Exh. 25):

> February 11, 1988
>
> Mr. Robert M. Young
> Assistant Counsel
> International Chemical Workers Union
> 1665 W. Market Street
> Akron, OH 44313
>
> Dear Mr. Young:
>
> This letter is written in reply to your letter dated 2/5/88.
>
> Representatives from Los Angeles Soap Company have met previously with Perryman and/or Wilson to discuss items 1-5 of your letter. Item 6 of your letter appears to be of little or no interest to Perryman. This observation is based upon personal conversations, telephone conversations and copies of correspondence to the Machinists Health and Welfare Trust which were sent to him. To the best of my knowledge, ICWU members are not entitled to any profit sharing plans, stock options, etc. If you have any contractual agreements which provide otherwise, then please produce same.
>
> You are requested to provide evidence to support your ludicrous allegation that we have unilaterally bargained with ICWU members.
>
> Yours very truly,
>
> LOS ANGELES SOAP COMPANY
> /s/ David L. Luckett
> Director of Administration
>
> DLL:lod
>
> CC: R. E. Stickman—LASCO
> V. E. Aguayo—NLRB

On February 17, 1988, the same representatives from the January 19, 1988 meeting convened again. Again the unfair labor practice charge was discussed. Thereafter, the parties resolved pending grievances and Wilson again asked if Respondent was going to pay severance to the laid-off employees. Again Luckett asked for the Union's written proposal.

On February 29, 1988, Union official Perryman wrote to Luckett to request a ''meaningful response'' to its earlier request for ''effects bargaining'' (Exh. 26). Luckett's March 3, 1988 reply to this letter generally reiterating past positions is included in the record (Exh. 27). In part, this letter reads as follows: ''The subject of severance pay is not contained in our Agreement. However, I am prepared to discuss this matter with you whenever you are ready to do so.''

Respondent's real property of slightly less than 8 acres was conveyed to a purchaser with the close of escrow on December 1, 1988.

B. *Analysis and Conclusions*

In *General Motors Corp*., 191 NLRB 951, 952 (1971), the Board held that a decision to sell a business is not a mandatory subject of bargaining under Section 8(a)(5) of the Act. This same issue was specifically reserved in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 fn. 22 (1981). After the sale, however, the employer is required to bargain over the effects of the sale.

In *Kirkwood Fabricators*, 862 F.2d 1303, 1306 (8th Cir. 1988), enfg. 285 NLRB 33 (1987), the court reviewed Board law on the issues presented by the instant case, and stated as follows:

> . . . for over twenty years [the Board has held] that bargaining over the effects on employees of a decision to sell a business and completely close operations is a mandatory subject of bargaining.

In *Kirkwood*, the court adopted the Board's position and enforced the case. The court also provided a persuasive and succinct rationale:

> Requiring effects bargaining maintains an appropriate balance between an employer's right to close its business and an employee's need for some protection from arbitrary action. . . . While requiring reasonable notice and effects bargaining may make a sale of a business more difficult, the ''ravages of economic dislocation'' inflicted on employees and their families terminated with no opportunities to plan their [future] . . . maintains the balance in favor of upholding the Board's determination as being reasonably defensible.

So-called effects bargaining provides the Union with an opportunity to bargain in the employees' interest for such benefits as severance pay, payments into the pension fund, preferential hiring if the employer continues operating at other plants, and reference letters with respect to other jobs. *Nathan Yorke, Trustee v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983), cert. denied 465 U.S. 1023 (1984), citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981). To this list of possible benefits which a union might wish to bargain over when the plant closes, I include health insurance, pension benefits, and retraining funds.

If there is a duty generally speaking, for an employer who sells its business to engage in ''effects bargaining,'' then it must follow, that an employer must give timely notice to the union of the decision to close, so that good-faith bargaining does not become futile or impossible. *Penntech Papers v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983). The determination of whether an employer has provided such meaningful and timely notice is essentially one of fact. *NLRB v. Emsing's Supermarket*, 872 F.2d 1279, 1286–1287 (7th Cir. 1989). To resolve the question of notice and related questions in the instant case, I turn to the record.

Based on facts contained in the Stipulation of Trial Record, I find that Respondent's decision to sell its business was economically motivated and did not turn on labor costs. Thus the record presents abundant evidence to show that Respondent was in dire financial straits and that there was little or no alternative to the sale of the business.

On October 28, Respondent's board of directors decided to sell the business for the ''fair market value'' of such assets (Exh. 9). On December 4, the sale actually occurred.[7] Despite Luckett's efforts to notify Wilson during the afternoon of Friday, December 4, notice was not given until the early evening hours.

In her brief, p. 18, General Counsel sets forth her position:

> At some point between October 28, when the Directors resolved to close the facility, and within a reasonable time prior to December 4, when the facility was in fact closed, Respondent bore a statutory obligation to notify the Union of the closure.''

I agree with General Counsel and find that her position is supported by relevant case law. For example, in *NLRB v. Emsing's Supermarket*, supra, 872 F.2d at 1287, the court affirmed the Board's finding that 3 to 4 days advance notice was not sufficient time.

In *Penntech Papers v. NLRB*, supra, 706 F.2d at 27, notice to the Union on the day of closing was found to be inadequate. In *National Car Rental Systems*, 252 NLRB 159, 162 (1980), enfd. 672 F.2d 1182 (3d Cir. 1982), postclosing notice to the union was found to be inadequate as matter had by then become fait accompli. But see *Chippewa Motor Freight*, 261 NLRB 455, 460 (1982).

A number of cases involving issues similar to that presented here may be distinguished. For example, there is the case of *Nathan Yorke, Trustee*, supra, 709 F.2d at 1143. To distinguish *Yorke* from the present case, I quote the court's statement in *Emsing's Supermarket*, supra at 1287, which also distinguished *Yorke:*

> In *Yorke*, a trustee in bankruptcy was appointed because the former management of a company had grossly mismanaged the company's dwindling assets. The day the trustee was appointed, he visited the company plant, found no employees at work, and learned that this was the result of a lack of funds. The trustee closed the plant the same day without notice to the Union. This court held that ''the emergency situation with which [the trustee] was confronted excused his obligation to notify the Union before closure.'' Id. at 1143. Mr. Emsing, by contrast, had been living with a declining financial situation for quite a while. ESI's problems were not the result of an immediate financial emergency but instead were the result of a steady erosion of ESI's financial well-being.

Like Emsing, this Respondent had also been dealing with a declining financial situation for some time and no true emergency existed.

Other cases presenting bona fide emergencies and excusing timely notice to the Union, such as *Kingwood Mining Co.*, 210 NLRB 844, 844–845 (1974), in which a grave economic crisis precipitated management's decision to terminate operations and excused notice, and *National Terminal Baking Corp.*, 190 NLRB 465, 466 (1970), in which an emergency situation was created by theft of the company's two delivery trucks making continuation of that enterprise impractical, simply do not apply to the instant case, which does not present a similar type of emergency.

Finally, the case of *Creasey Co.*, 268 NLRB 1425 (1984), may also be distinguished from the present case. In that case, the Board dismissed a complaint alleging that the timing of an employer's notice to the union of its closing, deprived the union of a significant opportunity to bargain in a meaningful manner. In *Creasey*, the union had received 3 days' advance notice of the employer's closing. In addition, the Board noted the perishable nature of the employer's products, its substantial inventory, and pressure from competitors to obtain cus-

[7] I find it to be of little or no significance that not all unit employees were laid off on December.

tomers from a closing distributor (Creasey). Some of these factors along with others in *Creasey* are present in the instant case. For example, in both cases, the notice of closing was kept not only from the union, but from customers, suppliers, and most management officials as well. On balance, however, I find there are more differences than similarities. Therefore, *Creasey* does not apply to the instant case.

In finding that Respondent did not provide timely notice to the Union, I also find that until Wilson received actual notice from Luckett on the evening of December 4, the Union had no obligation to request effects bargaining since ''suspicion or conjecture cannot take the place of notice where notice is required.'' *Penntech Papers v. NLRB*, supra, 706 F.2d at 27.

That Respondent failed to provide timely notice to the Union is confirmed by certain postnotice facts. For example, on several occasions after December 4, Wilson requested Respondent to engage in effects bargaining over severance pay and other benefits. Usually, Luckett responded not with effects bargaining, but by Luckett's counterrequests for Wilson to put his concerns in writing. This strategy does not lead me to conclude that the Union waived effects bargaining. Rather it shows that Respondent presented the Union with a fait accomplis at a time when that Union no longer retained its bargaining power. Therefore instead of meaningful bargaining, a series of meetings, telephone calls, and letters occurred which served to accomplish exactly nothing because Respondent failed to recognize its obligation under Federal labor law to give timely notice. See *National Car Rental System v. NLRB*, supra, 252 NLRB at 163.

In conclusion, I find that Respondent violated Section 8(a)(1) and (5) of the Act by failing to give timely notice to the Union of the sale of its business, thereby making impossible effects bargaining with the Union, in a meaningful manner and at a meaningful time. In reaching this decision, I have considered the various factors in the case on which Respondent relies to justify its course of action; possible sabotage, or strikes, potential loss of customers or suppliers, with the resulting failure of sale to close, and presence of other factors as well. Some of these present valid concerns, some are purely speculative. All have been considered in the context of Respondent's undeniable financial problems. Yet based on current Board law as enforced in the courts, none of this constitutes a defense to the charges herein. To the above analysis, I close with footnote 1 in *Kirkwood Fabricators v. NLRB*, supra, 862 F.2d at 1307, which reads as follows:

> Congress recently enacted a statute which requires employers of 100 or more employees to give their employees 60 days' advance notice of partial or complete closures. See Worker Adjustment and Retraining Notification Act. P.I. 100-379, 100 Stat 890 (1988). The Act does not come into effect until February 4, 1989. Id. at Section 11. The fact that Congress itself determined notifications should be required lends support to the proposition that the Board's determination is reasonably defensible.

CONCLUSIONS OF LAW

1. Respondent Los Angeles Soap Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Chemical Workers Union, Local 1, is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to timely notify and bargain in good faith with the Union about the effects of closing its business and terminating its employees, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Since Respondent has no place of business to post a notice to employees regarding violations and remedy, I shall recommend that Respondent be ordered to mail signed copies of the notice to the Union and to all of Respondent's employees represented by the Union and employed as of December 4, 1987. *Benchmark Industries*, 269 NLRB 1096, 1099 (1984). Because Respondent, sold all assets, closed its only place of business, and is now dissolved, the creation of preferential hiring list would be futile. Cf. *Authentic Furniture Products*, 272 NLRB 522 (1984).

As a result of Respondent's unlawful failure to bargain in a meaningful manner and at a meaningful time, about the effects of its cessation of operations, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representatives at a time when Respondent might still have been in need of their services, and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practice committed.

Accordingly, I shall recommend that, in order to effectuate the purposes of the Act, Respondent bargain with the Union concerning the effects on its employees of the closing of its operations, and shall order a limited backpay requirement designed both to make whole the employees for losses suffered[9] as a result of the violation and to recreate in some practical manner a situation in which the parties' bargaining is not entirely devoid of economic consequences for Respondent. Thus, Respondent shall pay employees represented by the Union backpay at the rate of their normal wages when last in Respondent's employ from 5 days after the date of the Board's Order until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the

[9] *Transmarine Navigation Corp*., 170 NLRB 389 (1968); *Interstate Tool Co*., 177 NLRB 686 (1969); *Authentic Furniture Co*., 264 NLRB No. 113 (Sept. 30, 1982) (unpublished); *Handy Spot, Inc*., 279 NLRB 1320 (1986).

effects of the closing of Respondent's operations on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the Board's Order, or to commence negotiations within 5 days of Respondent's notice of their desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum to any of these employees represented by the Union exceed the amount he or she would have earned as wages from December 4, 1987, the date on which Respondent terminated the Los Angeles, California operation, to the time he or she secured equivalent employment elsewhere, or the date on which Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the normal rate of their normal wages when last in Respondent's employ. Interest on all such sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Los Angeles Soap Company, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to timely notify and bargain with International Chemical Workers Union, Local 1, as the exclusive bargaining representative of all of its Los Angeles, California factory employees, excluding all office and clerical employees, watchmen, professional and technical employees supervisory employees, truckdrivers, machinists, engineers, carpenters, pipefitters, electricians, and warehousemen.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay the terminated employees represented by the Union their normal wages for the period set forth in the remedy section of the decision.

(b) On request, bargain in good faith with the Union as the exclusive bargaining representative of the employees specified above with respect to the effect on its employees of the decision to terminate the operations in Los Angeles, California and, if any understanding is reached, embody it in a signed agreement.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail an exact copy of the attached notice marked ''Appendix''[11] to the Union and to all factory employees represented by the Union and employed by Respondent on December 4, 1987, in the above-described appropriate unit at the Los Angeles, California facility. Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by their authorized representative, shall be mailed immediately upon receipt thereof, as herein directed.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with International Chemical Workers Union, Local 1 concerning the effects of our decision to close our Los Angeles, California facility on our factory employees represented by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL, on request, bargain collectively with the Union as the exclusive representative of certain of our factory employees, concerning the effects of our decision to close our Los Angeles, California facility on our factory employees, and reduce to writing any agreement reached as a result of such bargaining.

WE WILL pay the factory employees represented by the Union and who were employed at the above facility on December 4, 1987, their normal wages for a period specified by the National Labor Relations Board, plus interest.

LOS ANGELES SOAP COMPANY